

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEROY COOK, SR.,	§
	§ No. 228 and 284, 2010
Defendant Below-	§ CONSOLIDATED
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0608025757
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 28, 2010

Decided: September 14, 2010

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 14th day of September 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Leroy Cook, Sr., filed an appeal from the Superior Court's April 1 and April 21, 2010 orders denying his request that the Superior Court judge recuse himself and summarily dismissing his motion for postconviction relief pursuant to Superior Court Criminal Rule 61.¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the

¹ The Court consolidated the appeals by Order dated May 21, 2010.

judgment of the Superior Court on the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) In January 2009, Cook pleaded guilty to one count of Rape in the Second Degree. He was sentenced to 25 years of Level V incarceration, to be suspended after 12 years for probation. Cook did not file a direct appeal from his conviction. In October 2009, Cook filed a motion for postconviction relief grounded in, among other things, claims of ineffective assistance of counsel. After obtaining trial counsel's affidavit, the Superior Court denied the motion. This Court affirmed the Superior Court's judgment.³

(3) In March 2010, Cook filed a motion in the Superior Court requesting that the judge who had denied his first postconviction motion recuse himself. The Superior Court denied that motion as moot. In April 2010, Cook filed a second postconviction motion, which the Superior Court summarily dismissed. Cook filed appeals from both decisions of the Superior Court, which were subsequently consolidated.

(4) In this appeal from the Superior Court's denial of his request for recusal and its summary dismissal of his postconviction motion, Cook claims that the Superior Court erred a) by denying his motion for recusal; b)

² Supr. Ct. R. 25(a).

³ *Cook v. State*, Del. Supr., No. 333, 2009, Ridgely, J. (Feb. 26, 2010).

by failing to obtain affidavits from counsel and a response from the State and by failing to hold an evidentiary hearing prior to ruling on his postconviction motion; and c) by failing to conclude that his indictment was defective.

(5) Cook first claims that the Superior Court erred when it denied his motion for recusal. He contends that he anticipated filing a second motion for postconviction relief and wanted a different judge to rule on it. The record reflects that, at the time the motion was filed, there were no matters involving Cook pending before the Superior Court. Because the motion was not ripe for adjudication, the Superior Court properly denied the motion.⁴ On that basis, therefore, Cook's first claim is without merit.

(6) Cook's second claim is that the Superior Court erred by summarily dismissing his postconviction motion. He contends that the Superior Court should have ordered the record to be expanded, including an evidentiary hearing. Before considering the merits of a postconviction motion, the Superior Court must first determine whether the procedural requirements of Rule 61 have been met.⁵ In addition, it is within the Superior Court's discretion to decide whether an expanded record is required

⁴ *In re Brady*, Del. Supr., No. 255, 2007, Ridgely, J. (Aug. 6, 2007).

⁵ *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002).

in a particular case.⁶ In this case, the Superior Court properly determined that Cook's claims were procedurally barred by Rule 61(i)(3) and (4) and that relief was not warranted under Rule 61(i)(5). Moreover, the Superior Court properly exercised its discretion in determining that, under the circumstances of this case, an expanded record was not necessary. We, therefore, conclude that Cook's second claim is without merit.

(7) Cook's third claim is that the Superior Court wrongly concluded that his indictment was not defective. Because Cook unsuccessfully raised the claim of a defective indictment in his first postconviction motion⁷ and failed to demonstrate a colorable claim of a miscarriage of justice,⁸ the claim is barred. As such, the Superior Court properly ruled that Cook was foreclosed from pursuing that claim in his second postconviction motion.

(8) It is manifest on the face of the opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

⁶ Super. Ct. Crim. R. 61(g) and (h).

⁷ Super. Ct. Crim. R. 61(i)(4).

⁸ Super. Ct. Crim. R. 61(i)(5).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice